

ULSTER COUNTY ASSIGNED COUNSEL REPORT

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The mission of the Ulster County Comptroller's Office is to serve as an independent agency of the people and to protect the public by monitoring County government and to assess and report on the degree to which its operation is economical, efficient and its financial condition sound.

BACKGROUND

The Sixth Amendment of the United States Constitution, ratified in 1791, provides for fairness in the justice system by requiring that individuals facing criminal prosecution have a right to “the Assistance of Counsel for his defence (sic)”.¹ We in the United States have a fundamental right known as the presumption of innocence; persons are innocent until proven guilty in a court of law. When an individual is charged by the government with an offense, the prosecutor, who is an attorney, must prove the person guilty of the offense.

At one time in our history the right to counsel was made available only to people considered indigent or impoverished. In the 1963 Gideon v. Wainwright decision the U.S. Supreme Court interpreted the Sixth Amendment to mean that states must provide counsel to criminal defendants “who cannot afford to retain counsel”.

How is an individual’s ability to “afford to retain counsel” determined? A 1994 report by the NYS Defenders’ Association entitled “Determining Eligibility for Appointed Counsel in New York State” indicates that while no uniform guidelines exist, professional standards for the provision of defense services must be made on a case-by-case basis, and not be premised solely on any single factor. The standards expect that substantial consideration be given to the assets and debts of the defendant and the cost of privately retained counsel in the jurisdiction where the representation will occur.

Since 1965 New York State has mandated² that each county in the State provide for the assignment of counsel to defendants charged with a crime who cannot afford to hire an attorney to represent them. The law requires the counties to adopt a systemic plan for furnishing counsel and directs the counties to provide reimbursement and compensation to attorneys assigned to represent the defendant.

In accordance with NYS County Law §722 counties must place in operation a plan for providing counsel to persons charged with a crime or who are entitled to counsel who are financially unable to obtain counsel. Each assigned counsel plan must provide for investigative, expert and other services necessary for an adequate defense. Simply stated, the plan must conform to one of the following:

1. Representation by an appointed public defender;
2. Representation furnished by a private legal aid bureau or society;
3. Representation pursuant to a plan of a bar association;
4. Representation by a plan containing a combination of any of these three alternatives listed above.

Ulster County pays the attorney fees and expenses for individuals who are entitled to counsel in the courts within Ulster County.

¹ Sixth Amendment of the U.S. Constitution.

² NYS County Law Article 18-B

PURPOSE AND AUTHORITY

This report was undertaken to evaluate the economy and efficiency of expenditures made by Ulster County in fulfilling its mandate of providing an attorney to individuals who need and are unable to afford counsel.

This report was conducted pursuant to the County Comptroller's authority as set forth in Article A9-2(A) and A9-2(G) of the Ulster County Administrative Code.

SCOPE AND METHODOLOGY

The scope of this analysis is limited to the financial costs and program efficiency of the Assigned Counsel Program in Ulster County. The report relies on data from the NYS Unified Court System, Annual Program Reports by Ulster County Departments, interviews with County staff, and research as identified throughout the text.

PUBLIC DEFENSE IN ULSTER COUNTY

Until recently it was unknown that Ulster County has a filed and approved Assigned Counsel Plan ("the Plan"). In 1965 the Ulster County Bar Association submitted to the NYS Judicial Conference an assigned counsel plan for approval. The Plan was approved on a trial basis subject to reconsideration if inadequacies develop in practice.

In 1971 the Administrator of the Assigned Counsel Plan sought changes to the Plan and the new Plan was approved in November 1972. The objectives of the Plan are to:

provide proper representation for indigent defendants in criminal cases, to rotate the assignments equitably among members of the Bar, and to improve the qualifications of assigned counsel.

This Plan delegated administration to the Chairman of the Assigned Counsel Committee (which is defined as a standing committee of at least three members of the Bar Association).

The duties of the Administrator, among others, were to prepare a rotating list of attorneys willing to serve as assigned counsel and forward the list to the judges and justices in Ulster County. The Plan provided for a process of determining eligibility and for processing payment of claims submitted by attorneys. It further provided that in the event that legislation is enacted into law requiring a wider scope of assignments, the plan will conform with such new law.

In 1978, Ulster County enacted Local Law Number 3 creating the Office of the Public Defender; the law was later repealed and the Office recreated through the County's Charter which became effective in 2009. The Public Defender is charged with representing indigent criminal defendants and Family Law litigants throughout Ulster County and on appeal to the Appellate Division Third Department and the New York State Court of Appeals. The Public Defender's jurisdiction extends to 39 city, town and

village courts, Ulster County Court and Family Court and the four prisons located within Ulster County and the Ulster County Jail.³ We found nothing in the records that indicate that, with the creation of the Office of the Public Defender, the County's filed Plan was revoked or restructured.

Ulster County also pays for legal counsel to persons for whom it would be a conflict of interest for the Public Defender to represent. For example, two individuals are arrested and charged with a crime they purportedly both participated in, the Public Defender can only represent one individual, not both. Similar circumstances occur in Family Court where both parents are eligible for public representation but cannot be assigned the same attorney.

In these cases, counsel is appointed by the presiding judge or justice, and the legal costs are paid for by the County through its Assigned Counsel Program which is a responsibility of the Ulster County Department of Finance.

Attorneys accepting assigned counsel cases, known as Assigned Counsel Attorneys, are paid an hourly rate established by the State of New York: \$60 for misdemeanor cases and \$75 for felony cases and Family Court matters. The financial management of the assigned counsel cases is handled by the Ulster County Department of Finance.

Both the Ulster County Public Defender and the Assigned Counsel Program must file annual reports with the NYS Unified Court System using Form UCS195.

According to the 2010 UCS195 filed by the Public Defender, that office handled the following cases with a staff of 6 full time and 13 part time attorneys at a total cost of \$1,862,288.95 :

- 529 felonies,
- 4,595 misdemeanors, and
- 1,285 family court dispositions.

According to the 2010 UCS195 filed by the Department of Finance for assigned counsel cases, that office handled the following cases with 100 attorneys at a total cost of \$1,153,179.38:

- 190 felonies,
- 335 misdemeanors and
- 722 family court defendants referred (with 52 dispositions recorded).

The following chart summarizes data reported to the Unified Court System by both the Public Defender and Assigned Counsel over the past five years.

³ 2009 Ulster County Public Defender Annual Report

COMPARISON AVERAGE COST PER DEFENDANT

TABLE 1

Unified Court System Form 195 Data				
Year	Category	PD Total	AC Total	UC Total
2010	Average Cost per Defendant	\$ 319.93	\$ 975.62	\$ 430.60
	# of Defendants ¹	5821	1182	7003
	Total Cost	\$ 1,862,289.00	\$ 1,153,179.00	\$ 3,015,468.00
2009	Average Cost per Defendant	\$ 374.89	\$ 1,020.77	\$ 499.84
	# of Defendants	5057	1213	6270
	Total Cost	\$ 1,895,811.00	\$ 1,238,188.00	\$ 3,133,999.00
2008	Average Cost per Defendant	\$ 580.05	\$ 1,058.90	\$ 703.08
	# of Defendants	2973	1028	4001
	Total Cost	\$ 1,724,491.00	\$ 1,088,551.00	\$ 2,813,042.00
2007	Average Cost per Defendant	\$ 809.51	\$ 1,098.44	\$ 893.73
	# of Defendants	2015	829	2844
	Total Cost	\$ 1,631,155.00	\$ 910,606.00	\$ 2,541,761.00
2006	Average Cost per Defendant	\$ 757.35	\$ 1,248.83	\$ 899.81
	# of Defendants	1955	798	2753
	Total Cost	\$ 1,480,614.00	\$ 996,565.00	\$ 2,477,179.00
¹ Total number of defendants referred for all matters less number of defendants not represented after referral or for whom representation was discontinued.				

The data demonstrates that the cost per defendant represented by Assigned Counsel Attorneys is more than twice the cost per defendant represented by the Public Defender.

To clarify, there currently are two approaches in Ulster County to meeting the mandated obligation to provide counsel to persons who need representation but are unable to afford counsel:

1. The Office of the Public Defender, created by local law and headed by an attorney appointed by the County Executive with confirmation by the County Legislature; and
2. The "Assigned Counsel Program" which is administered by the Commissioner of Finance who is appointed by the County Executive with confirmation by the County Legislature.

The process currently in use by Ulster County in managing the Assigned Counsel Program and its related expenses involves:

1. Judges and justices:

- Determine if an individual is eligible for assigned counsel;
- Determine if a conflict of interest exists and assignment of counsel is required;
- Appoint attorneys to cases based on availability, convenience and other factors.

2. Attorneys:

- Are paid hourly rates set by New York State;
- May charge for basic expenses such as mileage and telephone;
- Must obtain written approval of the Judge or Justice for expenses related to the use of professional experts or witnesses;
- Submit their bills to the U. C. Department of Finance on a voucher with original signatures of the attorney and the Judge or Justice with the Order of Assignment attached;
- May use the process server in the Public Defender's office as available.

3. The U.C. Department of Finance:

- Has Assigned Counsel Guidelines which outline billing requirements for assigned counsel attorneys;
- Has not been provided a list of pre-qualified attorneys approved to serve as assigned counsel;
- Receives and processes all assigned counsel bills that have a court order attached and meet the billing requirements.

Supervision of what is referred to as the Assigned Counsel Program in Ulster County is minimal at best. There appears to be a common understanding within the County that the County must simply pay the bills and has no ability to control the program because judges and justices have full discretion. This is, in part, true but only because without an adopted program no guidelines and criteria exist to manage this service and its costs.

In an effort to ensure appropriate representation for defendants unable to afford counsel and to better manage the associated costs, in 2008 at the recommendation of the Public Defender the County Legislature established the Office of the Conflict Defender.⁴ The County's law was never funded and subsequent litigation in another county determined that the Office of a Conflict Defender was not contemplated in the iteration of the State law at that time. As discussed below, new NYS law addresses this matter.

⁴ Ulster County Local Law Number 1 of 2008.

Ulster County spends considerably more money providing mandated legal services through its assigned counsel program than it does under its Office of the Public Defender. Referring to Table 1 above, consider the difference in the costs per defendant between the Public Defender's Office (\$319.93) and the assigned counsel program (\$975.62) for 2010.

For illustration purposes, in Table 2 below we show:

1. the total costs incurred by Ulster County for the total number of defendants served by both the Assigned Counsel and Public Defender Programs,
2. then calculate what the total cost would be if the total number of defendants was charged at the public defender rate and
3. illustrate the potential savings by subtracting from the total actual cost the cost per defendant at the Public Defender (PD) rate.

This comparison of the two costs reports reflect the potential savings the County might realize if the assigned counsel program functioned under a structured program.

ILLUSTRATION OF SAVINGS WITH PROGRAM MANAGEMENT

Table 2

Unified Court System Form 195 Data				
Year	Category	UC Total ACTUAL COST	COST per defendant @ PD rate	Potential Savings
2010	Total Cost	\$ 3,015,468.00	\$ 2,240,470	\$ 774,998
	# of Defendants ¹	7003	7003	
	Average Cost per Defendant	\$ 430.60	\$ 319.93	
2009	Total Cost	\$ 3,133,999.00	\$ 2,350,560	\$ 783,439
	# of Defendants	6270	6270	
	Average Cost per Defendant	\$ 499.84	\$ 374.89	
2008	Total Cost	\$ 2,813,042.00	\$ 2,320,780	\$ 492,262
	# of Defendants	4001	4001	
	Average Cost per Defendant	\$ 703.08	\$ 580.05	
2007	Total Cost	\$ 2,541,761.00	\$ 2,302,246	\$ 239,515
	# of Defendants	2844	2844	
	Average Cost per Defendant	\$ 893.73	\$ 809.51	
2006	Total Cost	\$ 2,477,179.00	\$ 2,084,985	\$ 392,194
	# of Defendants	2753	2753	
	Average Cost per Defendant	\$ 899.81	\$ 757.35	
¹ Total number of defendants – Public Defender and Assigned Counsel - referred for all matters less number of defendants not represented after referral or for whom representation was discontinued.				

While correlation between the two forms of providing counsel to persons in need is not a simple apples-to-apples comparison, we provide this illustration to highlight the opportunities that exist for improving how the County manages assigned counsel expenses.

The Public Defender reports in his 2010 Annual Report that new legislation has been enacted which will allow for a Conflict Defender Office as part of an approved bar association plan that meets standards and criteria yet to be established. Further, a conflict defender plan must be approved by a State Administrator.

OPPORTUNITIES FOR IMPROVEMENT

This cost to the County will continue to grow. Crucial to the understanding this growth is the fact, as mentioned at beginning of this paper, that both the State and Federal requirements provide legal representation that is not predicated on an a person being "indigent" or devoid of all resources. Over many years defender associations and justices and legal rights organizations have researched and reported on the institutional failures of legal defense within the realm of civil law based on the concept of "indigence".

Jonathan Lippman, Chief Judge of the State of New York in a Law Day 2010 presentation stated that while New York provides for a limited statutory right to counsel in certain family proceedings, there generally is no right to counsel in civil cases in New York. Chief Judge Lippman, in stating his determination to bring the State closer to the ideal of equal access to civil justice said, "I believe [there] must be a comprehensive, multifaceted, systemic approach to providing counsel" and announced his appointment of The Task Force to Expand Access to Civil Legal Services in New York to recommend statewide priorities and standards among other objectives.

In his February 15, 2011 State of the Judiciary address entitled "Pursuing Justice", the Chief Judge discussed the report issued by that Task Force documenting that expanded civil legal representation actually more than pays for itself by saving State and local government hundreds of millions of dollars by "preventing unwarranted evictions, avoiding foster care places, curbing costs for homelessness, incarceration and social services, and bringing federal funds into New York." The Task Force estimated that for every dollar spent on civil legal services, five dollars are returned to the economy.

The November 2011 Task Force report documents the substantive economic activity in the local economy that results by bringing in federal dollars when New Yorkers are represented in civil legal cases. "In 2009, for example, some \$321 million in federal funds came to New Yorkers represented by civil legal services programs including: \$154 million in Supplemental Security Income/Social Security Disability benefits; \$113 million in federal Medicaid dollars; \$21 million in earned income tax credits; and more than \$32 million in additional federal benefits such as Veterans benefits and Medicare."

The Task Force to Expand Access to Civil Legal Services in New York established a goal of within four years reducing by at least half the 80% of the unmet civil legal needs of low-income New Yorkers.

Hailing New York's 2010 legislation creating a State Office of Indigent Legal Services (OILS), Chief Judge Lippman noted that the Office will focus on assisting and evaluating our State's multiplicity of counsel assignment systems, and supporting creative, cost-effective delivery systems that meet the constitutional right to indigent defense.

As identified by the Ulster County Public Defender in his 2010 annual report, the 2010 legislation has implications for how funds will be distributed to counties in the coming years. According to the New York State Defenders Association, beginning in 2015, counties will receive Indigent Legal Services Fund (ILSF) money through the new OILS through general distributions and grants. ILSF monies, according to the new law, are to be used to supplement and not supplant any local funds which the county would otherwise have had to expend for the provision of counsel and expert investigative and other services. All state funds received by counties are to be used to improve the quality of services.

Distributions of ILSF monies between now and 2015, to counties outside New York City, will be based on a percentage of the amount the county received in March 2010. Ulster County will receive:

In March 2011, 90% of the amount it received in 2010;
In March 2012, 75% of the amount it received in 2010;
In March 2013, 50% of the amount it received in 2010; and
In March 2014, 25% of the amount it received in 2010.

Exactly how OILS will distribute ILSF starting in 2011 is unknown at this time.

What is known, however, is that there are increased expectations for the provision of legal services to persons who cannot afford counsel in civil matters in addition to those individuals who are defendants facing criminal charges or find themselves in family court.

RECOMMENDATION

Ulster County needs a comprehensive legal services program that (1) fulfills unmet (and unaddressed in this paper) professional standards in mandated legal representation and (2) that meets those obligations with economy, efficiency and effectiveness.

Contrary to a general misunderstanding about judges and justices having full discretion in assigning counsel, the courts are expected to comply with the "18B" plan adopted by a county. Where a county has an adopted plan for indigent services, N.Y. County Law §722(4) provides in pertinent part that any judge, in assigning counsel, shall assign counsel furnished in accordance with a plan conforming to the requirements of N.Y.

County Law §722(4). It is only when a conflict of interest prevents the assignment of counsel pursuant to the plan in operation that a judge may assign outside counsel.⁵

When we compare the costs per case of indigent representation, it is clear to see the efficiencies achieved by the Public Defender's administration and coordination of services. We believe an improved level of economy and efficiency can be achieved, in part, through adoption and implementation of a County plan focused on the administrative and financial aspects of the County's Assigned Counsel Program.

Of course there must also be concerted effort with the Ulster County Bar Association to develop and obtain approval of the proposed Office of the Conflict Defender.

In these years of extreme economic challenge, the County need not wait until all the formalities of a truly professional program can be met to undertake a comprehensive administrative plan to manage costs.

We recommend the County Executive develop and the County Legislature adopt a plan for comprehensive fiscal management of its assigned counsel program. We call it an Administrative Plan for Assigned Counsel (APAC).

Components of an APAC are presented below with **examples** derived from a variety of sources. This example is solely intended to serve as a demonstration of administrative practices that might be employed to control this county expense; an actual APAC would be developed at the executive level and would be adopted at the legislative level. It is important to note that there are a host of other professional program needs that cannot be addressed with a fiscal management program alone.

EXAMPLE OF AN ADMINISTRATIVE PLAN FOR ASSIGNED COUNSEL

OBJECTIVE: **The objective of this assigned counsel administrative plan is to provide a coordinated and centralized financial administrative system for providing counsel to defendants unable to afford an attorney and where the Office of the Public Defender has a conflict of interest.**

SCOPE: **This plan applies to all eligible assignments arising in the Town, City, Village, County, Family, Surrogate, and Supreme Courts in Ulster County, and in the appellate courts and the four prisons located within Ulster County and the Ulster County Jail.**

DELEGATION: **The County's Department of Finance serves as the Administrator (Administrator) for the APAC and subject to appropriate County approval, develops and executes operational policy and control of the APAC.**

AUTHORITY: **The Administrator shall:**

⁵ See attached citation "In the Matter of Legal Aid Society of Orange County, Inc., Petitioner, v. Pano Z. Patsalos, Respondent. 92-04454.

1. Prepare the program budget.
2. Maintain uniform and proper billing practices.
3. Payment procedures:
 - Court orders assigning counsel must (1) clearly state the conflict that prevents the Public Defender from taking the case⁶ and (2) have an original signature on the order⁷.
 - After an attorney has completed an assignment, the attorney shall within 30 business days complete and forward to the Administrator a voucher in a form provided by the County, setting forth the services rendered, including the support services, the amount of time spent on each service, the total amount of all time spent, claimant certification and any other information required by the County.
 - The Administrator shall review the panel attorney's voucher for accuracy, to ensure there are no irregular charges, and to ensure all time charged is in accordance with applicable billing guidelines, laws, rules, regulations and policies.
 - Within three business days of receipt of attorney's voucher, the Administrator shall forward the attorney's voucher to the assigning judge. It shall be the assigning judge's responsibility to review the attorney's voucher for reasonableness and to consider recommendation made by the Administrator.
 - Review attorney vouchers prior to submission to assigning judge for payment order and make appropriate recommendations to the assigning judge regarding payment.
4. Maintain a record of all attorneys assigned directly by judges to represent defendants and other litigants who, for whatever reasons, may not be served by the Public Defender.
5. Provide periodic reports to judges regarding the number of outstanding assignments to each individual assigned attorney.
6. Develop and implement an APAC manual for attorneys and justices or judges outlining the terms of the APAC.
7. Maintain such statistics and make such reports as may be required by the County Executive or County Legislature.
8. Establish systems for collection of court ordered full or partial repayments.
9. Facilitate unified guidelines for eligibility incorporating Department of Social Services resource tracking programs and other interdisciplinary resources.
10. Comply with all Office of Court Administration reporting requirements.
11. Comply with Office of the State Comptroller requirements regarding Certification for Individuals Engaged in Certain Professions, RS 2414.
12. Maintain regular communication with Town Justices regarding their assignments of counsel and compliance with this APAC.
13. Coordinate with Town Justices an Inter-municipal Agreement regarding court schedules.
14. Clarify standards for related costs of representation: use of experts require advance approval; how to charge for transcripts; etc.
15. Institute a yearly review process of the plan to determine if the plan objectives are being met, establishing performance criteria, and recommending any changes that may be indicated.

⁶ Appointment of assigned counsel for convenience or expediency is not appropriate.

⁷ This is an important internal control to help ensure fictitious clients are not created using copied forms.

POST SCRIPT

In the course of finalizing the writing of this paper we have learned that Ulster County's Public Defender, Andrew Kossover, Esq., has obtained a grant from the new NYS Office of Indigent Legal Services (OILS) to strengthen the Assigned Counsel program and develop a model Conflict Defender program. This is good news.

We strongly recommend, however, that immediate efforts be made by the County to implement the administrative component as described above and begin at once to gain control over this burgeoning cost center.